UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

Case No. 8:20-CV-325-T-35MRM

BRIAN DAVISON;
BARRY M. RYBICKI;
EQUIALT LLC;
EQUIALT FUND, LLC;
EQUIALT FUND II, LLC;
EQUIALT FUND III, LLC;
EA SIP, LLC;

Defendants, and

128 E. DAVIS BLVD, LLC, et al.,

Relief Defendants.
_____/

RECEIVER'S UNOPPOSED FIFTEENTH MOTION TO APPROVE SETTLEMENT OF INVESTOR CLAWBACK CLAIMS

Burton W. Wiand, as Receiver over the assets of the Corporate and Relief Defendants,[1] moves the Court to approve the Receiver's settlement of

[1] The ("**Receiver**" and the "**Receivership**" or "**Receivership Estate**") has been expanded to include not only the Corporate and Relief Defendants but also the following entities: EquiAlt Qualified Opportunity Zone Fund, LP; EquiAlt QOZ Fund GP, LLC; EquiAlt Secured Income Portfolio REIT, Inc.; EquiAlt Holdings LLC; EquiAlt Property Management LLC; and EquiAlt Capital Advisors, LLC [Doc. 184, at 6–7] and EquiAlt Fund I, LLC [Doc. 284].

his clawback claims with EquiAlt investors Claude Schauer and Walter B. Wooldridge.

BACKGROUND

On February 11, 2020, the Securities and Exchange Commission ("SEC") filed a complaint (Doc. 1) against the above-captioned Defendants and Relief Defendants. On July 9, 2020, the SEC filed an amended complaint (Doc. 138) (the "Amended Complaint") against the same Defendants and Relief Defendants.

On February 14, 2020, the Court entered an order (Doc. 11) appointing Burton W. Wiand as temporary Receiver. The Court directed him, in relevant part, to "[t]ake immediate possession of all property, assets and estates of every kind of the Corporate Defendants and Relief Defendants . . . and to administer such assets as is required in order to comply with the directions contained in this Order." Doc. 11 at ¶1. The Court also entered a temporary restraining order (Doc. 10) imposing a temporary injunction against the Defendants and Relief Defendants, freezing their assets and granting other relief. On August 17, 2020, the Court issued an order (Doc. 184) granting the SEC's request for a preliminary injunction, extending the temporary restraining order pending the issuance of the preliminary injunction, and granting the Receiver's Motion to Expand the Receivership to Include REIT and QOZ Entities (Doc. 90).

The Amended Complaint charges the Defendants with violations of various federal securities laws and regulations for orchestrating a real estate Ponzi scheme that raised more than $170 million from approximately 1,100 victim investors (the "Scheme"). The SEC alleges that the Defendants misrepresented the use of the proceeds of the investments and that Davison and Rybicki, who controlled the operations of the Receivership Entities prior to the appointment of the Receiver, misappropriated monies from the investors.

Pursuant to this Court's Order, the Receiver was to "[i]nvestigate the manner in which the affairs of the Corporate Defendants were conducted and institute such actions and legal proceedings for the benefit and on behalf of the Corporate Defendants and Relief Defendants and their investors and other creditors as the Receiver deems necessary . . . against any transfers of money or other proceeds directly or indirectly traceable from investors in EquiAlt Fund, LLC, EquiAlt Fund II, LLC, EquiAlt Fund III, LLC, and EA SIP, LLC; provided such actions may include, but not be limited to . . . recovery and/or avoidance of fraudulent transfers . . . ." [Doc. 11 at ¶2]

To that end, the Receiver tasked his forensic accountants at Yip Associates to identify those EquiAlt investors who were "net winners" meaning that they had received their initial investment back plus any additional interest payments. The amounts these investors received in excess

of what they contributed were not legitimate profits, but instead, were simply the redistribution of money belonging to other investors. Those amounts are considered "false profits," and under well-established law, the Receiver is entitled to the return of the funds plus prejudgment interest.

On January 25, 2021, the Receiver's counsel sent settlement demands to 251 net winners seeking to settle his claims for 90% of the false profits they received. In this letter, the Receiver notified the "net winners" that if they did not accept the settlement demand, the Receiver would file a lawsuit against them to pursue his claims not only for the false profits but also the prejudgment interest. Many of those investors receiving the letters accepted the settlement demands. On February 13, 2021, the Receiver filed an action, *Wiand v. Adamek, et al.*, Case No. 8:21-cv-00360, naming 124 investors as defendants. After the filing of the *Adamek* case, Yip identified additional net winners. The Receiver's counsel sent settlement demands to these 17 net winners on April 6, 2021.

After the lawsuit was filed, certain of the investor defendants contacted undersigned counsel regarding resolving the Receiver's claims. Some of these defendants had not received the January 25th letter for various reasons (i.e. stale addresses, hospitalized, out of town). For those individuals, the Receiver honored the initial 90% settlement demand. For those individuals who had received the January 25th letter and chosen not to resolve their claims at that

time, the Receiver agreed to settle his claims against them at 100% of their false profits.[2]

Based on these efforts, a number of EquiAlt investors with false profits have agreed to settle their claims with the Receiver. The Court approved settlements with 76 investors on August 24, 2021 (Doc 360); 13 investors on September 2, 2021(Doc 363); 9 investors on September 20, 2021 (Doc. 392), 3 investors on October 20, 2021 (Doc. 427), 1 investor on November 1, 2021 (Doc. 433), 1 investor on January 3, 2022 (Doc 464), two investors on January 25, 2022 (Doc. 488), 1 investor on March 9, 2022 (Doc. 535), 1 investor on November 15, 2022 (Doc. 711), 1 investor on January 17, 2023 (Doc. 733), and four investors on March 6, 2023 (Docs. 827, 828, and 829).

In the *Adamek* case, the Receiver has obtained clerk's defaults against a number of defendants. Recently, the Receiver filed an omnibus motion for default judgment and reached out to those defendants that were the subject of that motion to make one last attempt to resolve those claims. Based on that communication, the Receiver has recently resolved his claims against defaulted defendants Claude Schauer ($5,820.82) and Walter B. Wooldridge ($9,716.76).

[2] In settling these claims, the Receiver has agreed to waive prejudgment interest and costs.

Each of these investors have signed the settlement agreement in the form previously approved by the Court and will pay the settlement according to the terms of the agreement.

ARGUMENT

I. THE COURT HAS BROAD POWER OVER THIS RECEIVERSHIP, AND THE SETTLEMENT OF THESE INVESTOR CLAWBACK CLAIMS IS IN THE RECEIVERSHIP ESTATE'S BEST INTEREST.

The Court's power to supervise an equity receivership and to determine the appropriate actions to be taken in the administration of the receivership is extremely broad. *S.E.C. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992); *S.E.C. v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986). The Court's wide discretion derives from the inherent powers of an equity court to fashion relief. *Elliott*, 953 F.2d at 1566; *S.E.C. v. Safety Finance Service, Inc.*, 674 F.2d 368, 372 (5th Cir. 1982). A court imposing a receivership assumes custody and control of all assets and property of the receivership, and it has broad equitable authority to issue all orders necessary for the proper administration of the receivership estate. *See S.E.C. v. Credit Bancorp Ltd.*, 290 F.3d 80, 82-83 (2d Cir. 2002); *S.E.C. v. Wencke*, 622 F.2d 1363, 1370 (9th Cir. 1980). The court may enter such orders as may be appropriate and necessary for a receiver to fulfill his duty to preserve and maintain the property and funds within the receivership estate. *See, e.g., Official Comm.*

Of Unsecured Creditors of Worldcom, Inc. v. S.E.C., 467 F.3d 73, 81 (2d Cir. 2006). Any action taken by a district court in the exercise of its discretion is subject to great deference by appellate courts. *See United States v. Branch Coal*, 390 F. 2d 7, 10 (3d Cir. 1969). Such discretion is especially important considering that one of the ultimate purposes of a receiver's appointment is to provide a method of gathering, preserving, and ultimately liquidating assets to return funds to defrauded investors and other creditors. *See S.E.C. v. Safety Fin. Serv., Inc.*, 674 F.2d 368, 372 (5th Cir. 1982) (court overseeing equity receivership enjoys "wide discretionary power" related to its "concern for orderly administration") (citations omitted). Given these principles, the Court should approve the Receiver's settlement with these investors.

CONCLUSION

Based on the foregoing, the Receiver moves the Court for entry of an order approving the Receiver's settlement of the following investor clawback claims:

- Claude Schwuer, $5,820.82; and
- Walter B. Wooldridge, $9,716.76.

LOCAL RULE 3.01(G) CERTIFICATION

Counsel for the Receiver has conferred with counsel for the SEC and they do not object to the relief sought.

Dated: March 10, 2023.

Respectfully submitted,

/s/ Katherine C. Donlon
Katherine C. Donlon, FBN 0066941
kdonlon@jclaw.com
Johnson, Cassidy, Newlon & Decort P.A.
3242 Henderson Blvd., Ste 210
Tampa, FL 33609
Tel: (813) 291-3300

and

Jared J. Perez, FBN 0085192
jared.perez@jaredperezlaw.com
Law Office of Jared J. Perez
301 Druid Rd. W
Clearwater, FL 33759
Tel: (727) 641-6562

and

R. Max McKinley, FBN 119556
mmckinley@guerraking.com
Guerra King P.A.
The Towers at Westshore
1408 N. Westshore Blvd., Ste. 1010
Tampa, FL 33607
Tel: (813) 347-5100

Attorneys for Receiver Burton W. Wiand

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 10, 2023, I electronically filed the foregoing with the Clerk of this Court by using the CM/ECF system which will send notification of electronic filing to all counsel of record.

/s/ Katherine C. Donlon